

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

MICHAEL D. ROGERS

PLAINTIFF

vs.

Civil Action No. 1:97cv10-D-D

MODERN WOODMEN OF
AMERICA and RANDY B. EAVES

DEFENDANTS

MEMORANDUM OPINION

Presently before the court is the motion of the plaintiff Michael D. Rogers to remand¹ this action to the Circuit Court of Winston County, Mississippi. Finding that the motion is well taken, the court shall grant it and return this cause to state court.

Discussion

Standard for a motion to remand

A motion to remand based upon defects in the removal procedure must be made within thirty days after the filing of the notice of removal. 28 U.S.C. § 1447(c). However, this court is required to remand any action over which it has no subject matter jurisdiction at any time prior to the entry of final judgment. Burks v. Amerada Hess Corp., 8 F.3d 301, 304 (5th Cir. 1993); Buchner v. F.D.I.C., 981 F.2d 816, 817 (5th Cir. 1993); In re Wilson Indust., 886 F.2d 93, 96 (5th Cir 1989). 28 U.S.C. § 1447. Consequently, an objection to the subject matter jurisdiction of this court may be raised by any party at any time in the course of these proceedings, and may

¹ Also pending before the court is the motion of the defendants to dismiss defendant Randy Eaves from this action pursuant to Fed. R. Civ. P. 12(b)(6). As the present motion addresses the subject-matter jurisdiction of this court to even hear this action, the court will first take up the plaintiff's motion to remand. In any event, a determination by the undersigned on the defendants' motion to dismiss would have no impact upon its consideration of the present motion. The propriety of removal is determined *as of the time of removal*, and subsequent events have no effect upon the appropriateness of remand. See, e.g., FreePort McMoRan, Inc. v. K.N. Energy, Inc., --- U.S. ---, 111 S.Ct. 858, 860, 112 L.Ed.2d 951 (1991); Zurn Indus., Inc. v. Acton Const. Co., 847 F.2d 234, 236 (5th Cir.1988); Carlton v. BAWW, Inc., 751 F.2d 781, 785 (5th Cir.1985).

even be raised by the court *sua sponte*. See Mall v. Atlantic Financial Fed., 127 F.R.D. 107 (W.D. Pa. 1989); Glaziers, Glass Workers of Jacksonville v. Florida Glass & Mirror of Jacksonville, 409 F.Supp. 225, 226 (M.D. Fla. 1976); 28 U.S.C. § 1447.

Further, the Fifth Circuit noted in Buchner that there are only three situations under statute in which a federal trial court may remand a claim to state court. Buchner, 981 F.2d at 819. Those circumstances are: (1) a trial court has discretion to remand state law claims that were removed along with one or more federal question claims; (2) it must act on a timely motion to remand based on a defect in removal procedure; and (3) it must remand a case over which it has no subject matter jurisdiction. Id. A district court exceeds its authority when it remands a case on grounds not permitted by statute. Thermtron Prod., Inc. v. Hermansdorfer, 423 U.S. 336, 351, 96 S.Ct. 584, 593, 46 L.Ed.2d 542 (1976); Buchner, 981 F.2d at 820. There is a single exception to the Thermtron rule, and that exception is "a district court has discretion to remand to state court a removed case involving pendent claims upon a proper determination that retaining jurisdiction over the case would be inappropriate." Carne-Mellon Univ. v. Cohill, 484 U.S. 343, 357, 108 S.Ct. 614, 623, 98 L.Ed.2d 720 (1988). In Carnegie-Mellon, the court determined that retaining jurisdiction was inappropriate where only pendent state law claims remained to be decided after all federal claims had been dropped. Carnegie-Mellon, 484 U.S. at 354-56, 108 S.Ct. at 621-22. The Fifth Circuit has determined that this exception is to be construed narrowly, and that as long as diversity jurisdiction or federal question jurisdiction still exists, a court may not remand the cause to a state court for determination. Buchner, 981 F.2d at 820. In this case, the defendants claim in their Notice of Removal that this court has subject matter jurisdiction over the cause at bar by virtue of diversity jurisdiction as well as federal question jurisdiction.

The court addresses each argument in turn.

B. Diversity Jurisdiction - Fraudulent Joinder

In his complaint, the plaintiff names as defendants the entity Modern Woodmen of America and the individual Randy Eaves. Eaves, a Mississippi resident, is a non-diverse party and his presence in this action defeats this court's exercise of diversity jurisdiction as long as he is properly joined as a party defendant. However, the defendants assert that Eaves has been fraudulently joined by the plaintiff for the specific purpose of defeating the diversity jurisdiction of this court.

The defendants carry an extremely heavy burden in establishing fraudulent joinder, and must establish it by clear and convincing evidence. Jernigan v. Ashland Oil Co., 989 F.2d 812, 815 (5th Cir. 1989); B., Inc. v. Miller Brewing, Inc., 663 F.2d 545, 549 (5th Cir.1981). The standards used to determine whether a party has been fraudulently joined are well established within the Fifth Circuit:

Where charges of fraudulent joinder are used to establish [federal] jurisdiction, the removing party has the burden of proving the claimed fraud To prove their allegation of fraudulent joinder [removing parties] must demonstrate that there is no possibility that [the plaintiff] would be able to establish a cause of action against them in state court. In evaluating fraudulent joinder claims, we must initially resolve all disputed questions of fact and all ambiguities in the controlling state law in favor of the non-removing party. We are then to determine whether that party has any possibility of recovery against the party whose joinder is questioned.

Dodson v. Spiliada Maritime Corp., 951 F.2d 40, 42 (5th Cir.1992); see also Rivet v. Regions Bank of La., --- F.3d ---, 1997 WL 112107, *17 n. 21 (“[W]e will nevertheless examine the questioned joinder of a non-diverse defendant and hold it to be fraudulent . . . when there is no possibility of recovery against that party.”). A second method to establish fraudulent joinder is

by showing that there was outright fraud in the plaintiff's pleading of jurisdictional facts.

Jernigan, 989 F.2d at 815; B., Inc. v. Miller Brewing Co., 663 F.2d 545, 549 (5th Cir.1981).

Finally, "a joinder is fraudulent if the facts asserted with respect to the resident defendant are shown to be so clearly false as to demonstrate that no factual basis existed for any honest belief on the part of the plaintiff that there was joint liability." Bolivar v. R & H Oil & Gas Co., Inc., 789 F.Supp. 1374, 1376-77 (S.D. Miss.1991).

This court is not to "pre-try" the case in determining removal jurisdiction, but it may consider summary judgment-type evidence such as affidavits and deposition testimony. Cavallini v. State Farm Mut. Auto Ins. Co., 44 F.3d 256, 262 (5th Cir.1995) ("While we have frequently cautioned the district courts against pretrying a case to determine removal jurisdiction, we have also endorsed a summary judgment-like procedure for disposing of fraudulent joinder claims."); Ford v. Elsbury, 32 F.3d 931, 935 (5th Cir.1994); Carriere v. Sears, Roebuck & Co., 893 F.2d 98, 100 (5th Cir.1990). While not required to do so, plaintiffs may submit affidavits and deposition transcripts to supplement the factual allegations in their complaint. Lackey v. Atlantic Richfield Co., 990 F.2d 202, 208 (5th Cir.1993). " 'Piercing the pleadings' in this fashion is permitted so as to avoid a plaintiff's depriving diverse defendants of a federal forum by mere conclusory allegations which have no basis in fact." Doe v. Cloverleaf Mall, 829 F.Supp. 866, 870 (S.D. Miss.1993). As noted, the inquiry in this regard is similar to that used in a motion for summary judgment. LeJeune v. Shell Oil Co., 950 F.2d 267, 271 (5th Cir.1992).

The defendants seek to establish s case primarily by arguing to the court that the plaintiff has failed to adequately state legal claims against Eaves in his complaint. The defendants misconstrue their burden in establishing fraudulent joinder. This court does not engage in a

determination of whether the plaintiff's complaint is sufficient under the applicable rules of pleading or civil procedure. Rather, this court merely takes as true the allegations from the plaintiff's complaint in determining if there is any *possibility* of recovery against the non-diverse defendant:

If, *having assumed all of the facts set forth by the plaintiff to be true* and having resolved all uncertainties as to state substantive law against the defendant(s), the district court should find that there is *no possibility* of a valid cause of action being set forth against in-state defendants, only then can it be said that there has been a "fraudulent joinder." However, if there is even a possibility that a state court would find a cause of action stated against any one of the named in-state defendants *on the facts alleged by the plaintiff*, then the federal court must find that the in-state defendant(s) have been properly joined, that there is incomplete diversity, and that the case must be remanded to the state courts.

B., Inc., 663 F.2d at 550 (internal citations omitted) (emphasis added). While the defendants' arguments regarding legal deficiencies of the plaintiff's complaint may have relevance in light of their motion to dismiss,² this court is not considering that motion today. Further, as to the defendants' argument that Mr. Eaves may not be held liable in contract with his disclosed principal, Modern Woodmen, this court finds the prospect insufficient on its own to meet the defendants' burden. Mr. Rogers has stated sufficient facts in his complaint to maintain tort actions, and not merely contract claims, against Mr. Eaves. See, e.g., American Fire Protection, Inc. v. Lewis, 653 So. 2d 1387, 1391 (Miss. 1995); ("[A]n individual may be held jointly liable with a corporation for a tort he commits as an agent of the corporation."); Russell v. New York Life Ins. Co., Civil Action No. 3:97cv006-D-A (N.D. Miss. Feb. 1997) (Davidson, J.) (Memorandum Opinion and Order Denying Motion to Dismiss); Newsome v. Shelter Gen. Ins.

² Indeed, the crux of defendants' arguments are contained in their memorandum supporting their separately filed motion to dismiss, which they adopt by reference in their response to the plaintiff's motion to remand.

Co., 792 F. Supp. 1022, 1025 (S.D. Miss. 1991); but see Bass v. California Life Ins. Co., 581 So. 2d 1087, 1090 (Miss. 1991).

When considering the allegations set forth in the plaintiff's complaint, as well as the affidavit proof submitted by the plaintiff in support of his motion to remand, this court cannot say that there is "no possibility" that the plaintiff will be able to recover in state court against the defendant Eaves. The defendants have failed to demonstrate to this court, by clear and convincing evidence, that the defendant Eaves has been fraudulently joined in this action to defeat the exercise of diversity jurisdiction by this court.

Federal Question Jurisdiction

In addition, the defendants charge that this court possesses "federal question" jurisdiction over the plaintiff's claims:

Reduced to its essence, plaintiff complains that he has been accused of criminal activity (mail fraud; 18 U.S.C. 1441-42), and that Modern Woodmen cooperated with "the United States Postal Service, the Federal Bureau of Investigation and the United States Attorney's Office." ¶ 8 of Complaint. While it is true that the plaintiff has not specifically requested relief under a federal statute, such a request is not necessary to invoke the Court's federal question jurisdiction . . .

If the plaintiff's allegations in the instant case are to be taken seriously, they implicate the mail fraud statute and the rights and duties of citizens to cooperate with federal law enforcement officials. If defendants' actions relating to these matters are not wrongful under federal law, they are not actionable.

Defendants' Brief, p.4. To the extent that the defendants are attempting to utilize federal law as a defense to the plaintiff's claims, e.g., that it was their obligation under federal law to cooperate in the investigation of the plaintiff, those federal defenses do not make this action removable to this court.

[I]t is now well settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated

in the plaintiff's complaint, and even if both parties concede that the federal defense is on the only question truly at issue.

Caterpillar v. Williams, 482 U.S. 386, 393, 107 S.Ct. 2425, 2430, 96 L.Ed.2d 318, 327 (1987) (citing Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 12, 103 S.Ct. 2841, 2847-48, 77 L.Ed.2d 420, 431 (1983)); see also Merkel v. Federal Express Corp., 886 F.Supp. 561, 565 (N.D. Miss.1995).

Secondly, as to any other connection federal law has with this case, the undersigned finds that the defendants have not carried their burden to demonstrate to this court that there exists a sufficiently "substantial" federal question to invoke the removal power. In order to make this cause removable to this court on the basis of federal question jurisdiction in this manner, the defendants shoulder the burden of demonstrating that a substantial question of federal law is necessary to the resolution of the plaintiff's claims. Franchise Tax Board v. Const. Laborers Vacation Trust, 463 U.S. 1, 103 S.Ct. 2841, 2846, 77 L.Ed.2d 420 (1983); Kidd v. Southwest Airlines, 891 F.2d 540, 542 (5th Cir. 1990); First Nat. Reserve, L.C. v. Vaughn, 931 F.Supp. 463, 468 (E.D. Tex. 1996).

[T]he mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction. Indeed, in determining that federal-question jurisdiction was not appropriate in the case before us, we stressed Justice Cardozo's emphasis on principled, pragmatic distinctions: "What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of causation . . . a selective process which picks the substantial causes out of the web and lays the other ones aside."

Merrill Dow Pharmaceuticals v. Thompson, 478 U.S. 804, 813-14, 92 L.Ed.2d 650, 661-62, 106 S.Ct. 3229 (1986); see also Grantham v. Avondale Indus., Inc., 964 F.2d 471, 474 (5th Cir. 1992); Highland Hills Hosp. v. State, DHH, 926 F. Supp. 83, 85 (M.D. La. 1996) ("Federal question

jurisdiction is not presented simply because a claim involves a federal issue."). As noted, there exists no static, rigid formula for determining whether federal question jurisdiction exists based upon the "construction or interpretation" of federal law. Nevertheless, this undersigned must consider whether it is appropriate for this court to exercise original federal jurisdiction over the plaintiff's claims.

The defendants have indeed shown that the plaintiff's claims may involve some incidental analysis of federal law. They have not, however, shown that the role of federal law in this case would be sufficiently *substantial*. All that the defendants have presented to this court is that one element of the state law claims may involve an accusations of violating federal criminal statutes, not that the plaintiff's claims somehow hinge upon an interpretation or construction of those statutes. See Kidd, 891 F.2d at 542 ("A case 'arises under' federal law when the vindication of a right under state law *necessarily turns upon some construction of federal law*."). (emphasis added). Based upon the assertions by the defendants, all that may be required by the plaintiff in this matter is some recitation of the elements of the federal crimes in question and a jury's determination of whether the defendants wrongfully accused the plaintiff of committing the acts in question or made false statements to federal officials. The involvement of federal criminal law in this claim appears to be purely incidental. Plaintiff's Rebuttal Brief, p. 8 ("Plaintiff's right to relief is based on the Defendants' false and defamatory assertion that he is a criminal, not on the interpretation of any particular statute."). When considering not to be resolved in favor of remand, this court cannot say that such an exercise by a state court would involve "a substantial, disputed question of federal law" as is required for this court to exercise original jurisdiction over the plaintiff's state law claims.

Conclusion

After careful consideration, the court finds that the plaintiff's motion to remand this cause is well taken and the court shall grant it. The defendants have failed to carry their burden to establish that the defendant Randy Eaves was fraudulently joined in this matter so that the undersigned might ignore his citizenship in determining whether the exercise of diversity jurisdiction is proper. Further, the defendants have failed to demonstrate the presence of original federal question jurisdiction in the plaintiff's well-pleaded complaint.

A separate order in accordance with this opinion shall issue this day.

This the _____ day of April 2001.

United States District Judge

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Civil Action No. 1:97cv10-D-D

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DEFENDANTS

ORDER GRANTING MOTION TO REMAND

Pursuant to a memorandum opinion issued this day, it is hereby ORDERED THAT:

-) the plaintiff's motion to remand this cause to the Circuit Court of Winston County, Mississippi is hereby GRANTED. This cause is hereby REMANDED to the Circuit Court of Winston County, Mississippi.
-) the motion of the defendants to strike the affidavit of the plaintiff Michael D. Rogers in this matter is hereby DENIED. All remaining motions in this cause shall be taken up by the Mississippi Circuit Court Judge assigned to this cause after remand in whatever manner that Judge deems appropriate.

SO ORDERED, this the _____ day of April 2001.

United States District Judge